

International Refugee Law

Once people cross over an international border due to persecution (or a legitimate fear of it), they become refugees and trigger protections of International Refugee Law (IRL). Refugees are people who, due to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, are unwilling or unable to seek protection inside of their own country, or to return, due to that fear.¹ While it is true that one ceases to be a refugee once the conditions leading to that status cease to exist,² the evidence does not demonstrate this to be the case for Afghans.

The foundation of IRL is the 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees.³ The 1951 Convention builds upon Article 14 of the Universal Declaration of Human Rights (UDHR). The UDHR “constitutes neither a treaty nor a formal source of international law. However, it is often assumed or claimed that the UDHR has the status of customary international law.”⁴ The 1951 Convention and its 1967 Protocol are the only global instruments that offer protection to refugees (in terms of their status

¹ Convention Relating to the Status of Refugees, Art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137. <http://legal.un.org/avl/ha/prsr/prsr.html>.

² Convention Relating to the Status of Refugees, Art. 1(C), July 28, 1951, 189 U.N.T.S. 137. <http://legal.un.org/avl/ha/prsr/prsr.html>.

³ “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol,” last modified April 2015. <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>. 145 States are party to the Convention and 146 are party to the Protocol. 142 States, such as Iran, are party to both. 148 are party to one or both. Pakistan is party to neither. *See also*: <http://treaties.un.org>, for information on UN treaty status, ratifications, reservations, date of entry into force, etc.

⁴ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2016), 62.

and rights *as refugees*). The 1967 Protocol affirmed and slightly amended the 1951 Convention (e.g., to allow more people to be defined as refugees by dispensing with time and geographic limits). Unlike other human rights treaties, the 1951 Convention has no monitoring body or compliance mechanism to which individuals or States can direct complaints. Although verbal condemnation is technically the only recourse against Convention violations, the cumulative pressure of foreign aid, international relations, public attention, UN bodies, and NGOs can be quite substantial.

The Convention does not dictate who makes the determination of refugee status nor the procedure for making such a determination. However, the United Nations High Commissioner for Refugees (UNHCR) has come to be the main body assisting in the formation and implementation of those State procedures. The UNHCR's protection mandate includes people who meet the 1951 definition but it has been expanded through General Assembly (GA) and Economic and Social Council (ECOSOC) resolutions. As such, the scope of UNHCR protection to refugees also includes those who have fled their countries and are unable or unwilling due return due to "serious threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing the public order."⁵

Conflict-induced displacement of Afghans may qualify them as refugees and trigger protections under Article 1(A)(2) 1951 Convention if there is a reasonable possibility that they would experience serious harm as a result of the conflict – one instance or many instances taken together amounting to persecution – for reasons of race, religion, nationality, membership in a

⁵ United Nations High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan," 6, last modified April 19, 2016. <http://www.refworld.org/docid/570f96564.html>.

particular social group, or political opinion. Persecution need not have been personally directed at a specific individual in order to be found to have been suffered.⁶ For Afghans, examples might include violence aimed at civilians of specific ethnic, political or religious profiles in locations where they predominantly reside or gather such as mosques, schools, markets, or weddings; non-governmental parallel justice structures, illegal punishments, threats, taxation, intimidation imposed upon them; forced recruitment into militias; or constraints on access to food, education, and healthcare.

Beyond the 1951 Convention protections to certain categories of people, threats to the lives, physical integrity or freedom of Afghans are also assessed in light of the UNHCR mandate. Indicators might include numbers of casualties resulting from attacks or the numbers of civilians displaced due to the conflict. Threats to livelihood can derive from one or multiple instances conflict-related violence. They can be direct, immediate threats or longer-term, indirect consequences of the conflict.

The UNHCR regards as possibly eligible for international protection individuals who are coming from areas of active conflict (areas of fighting between the government and AGEs, areas where AGEs have effective control, or areas where AGEs are fighting one another), depending on the details of individual cases. The table of contents of the “UNHCR’s Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan” contains a laundry list of individuals who are especially vulnerable to violence, as well as those individuals who are ineligible for refugee protection. Potentially eligible people include

⁶ United Nations High Commissioner for Refugees, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan,” 5, last modified April 19, 2016. <http://www.refworld.org/docid/570f96564.html>.

journalists, men of fighting age, members of minority religions, individuals in blood feuds, LGBTI, trafficking survivors, and women and children with certain profiles. Potentially excludable people include former or current members of anti-government elements, Communist Regimes, the Afghan Security Forces, or pro-government paramilitary groups.

In addition to international protection, regional treaties may expand the definition of “refugee” and therefore offer safeguards to Afghan refugees outside of Central/South Asia or the Middle East. For example, the Cartagena Declaration of 1984 extends the refugee definition of the 1951 Convention and its 1967 Protocol.⁷ This definition includes persons fleeing threats to their lives or freedom due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances that have seriously disrupted public order. The African Union’s 1969 Convention Governing Specific Aspects of Refugee Problems,⁸ expands the definition of refugees to include those fleeing external aggression, occupation, foreign domination or events seriously disturbing public order in part or all of the country. Finally, several hundreds of thousands of Afghans have fled to Europe, where the European Court of Human Rights has applied the European Convention on Human Rights to cases of refugee mistreatment.⁹

⁷ The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America, November 22, 1984. http://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

⁸ Convention Governing Specific Aspects of Refugee Problems, September 10, 1969. <http://www.achpr.org/instruments/refugee-convention/>. Adopted by the Assembly of Heads of State and Government, CAB/LEG/24.3. It entered into force on June 20, 1974.

⁹ See e.g.: *M.S.S. v Belgium and Greece*, Application no. 30696/09, (European Court of Human Rights 2011), where the Court found [Belgium to be in violation of the European Convention on Human Rights](#) for exposing an Afghan national to detention, harsh living conditions, and risks arising from shortcomings in Greece’s asylum system by returning him to Greece rather than adjudicating his claim in Belgium.

In an effort to bring more practical, technical order to the logistical care of refugees, 193 countries adopted New York Declaration for Refugees and Migrants and Comprehensive Refugee Response Framework in the UN General Assembly in 2016.¹⁰ This document addresses the problems faced by both refugees and migrants, including unsafe travel, susceptibility to trafficking in persons, a higher prevalence of sexual violence and difficulty in accessing medical care. It commits the UN to the development of a Comprehensive Refugee Response Framework, applicable to large refugee movements. Among other things, this framework involves a process of admission and reception that is complete and organized, continuous support to refugees and host countries, and durable solutions.

11. We reaffirm the primary goal of bringing about conditions that would help refugees return in safety and dignity to their countries and emphasize the need to tackle the root causes of violence and armed conflict and to achieve necessary political solutions and the peaceful settlement of disputes, as well as assist in the reconstruction efforts. In this context, States of origin/nationality would:

...

(b) ...respect the obligation to receive back their nationals...in a safe, dignified and humane manner with full respect for human rights.

...

12. To ensure sustainable return and reintegration, States, United Nations organizations and relevant partners would:

(a) recognize that the voluntary nature of repatriation is necessary as long as refugees continue to require international protection...¹¹

Several aspects of this Comprehensive Refugee Response Framework are noteworthy. It acknowledges that violence and armed conflict are root cause of displacement and it recognizes that peacebuilding and reconstruction are solutions to displacement. It reaffirms the

¹⁰ New York Declaration for Refugees and Migrants, A/RES/71/1.
<https://refugeesmigrants.un.org/new-york-declaration-refugees-and-migrants-ares711>.

¹¹ New York Declaration for Refugees and Migrants, A/RES/71/1, Annex 1, Comprehensive Refugee Response Framework, paras. 11-12.
<https://refugeesmigrants.un.org/new-york-declaration-refugees-and-migrants-ares711>.

responsibility of countries of origin to welcome the return of their refugees and to consistently, fully honor human rights during that process. Finally, in stressing refugees' right of voluntary consent to return, the Framework reiterates the responsibility of host countries not to expel refugees to situations of violence and persecution.